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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

JAMES T. THORNTON,
Defendant in Error,
vs.
JOEL D. SUGG, AND E. C. SUGG & BRO.,
Plaintiffs in Error.

1141

Error from the Supreme Court of Texas.

Motion to Dismiss Writ of Error or Affiirm Judgment, and Brief in Support of Motion.

WARNER, DEAN & HAGERMAN,
Attorneys for Defendant in Error.

KANSAS CITY, MO.:
GERARD BROS. & WOODY, PRS., 613 DELAWARE ST.
1889.

IN THE

SUPREME COURT OF THE UNITED STATES.

JAMES T. THORNTON,
Defendant in Error,
vs.
JOEL D. SUGG, AND E. C. SUGG & BRO.,
Plaintiff in Error.

MOTION TO DISMISS OR AFFIRM.

Now comes James T. Thornton, the above named defendant in error, and moves the court to dismiss the writ of error in this case:

1. Because it manifestly appears from the record in this case that there was not drawn in question in this case, in the Supreme Court of Texas, from which court the writ of error is prosecuted, the validity of any statutes of the State of Texas on the ground of the same being repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision of said court did not sustain the validity of such statutes.

2. Because this writ of error is prosecuted from the Supreme Court of the State of Texas, and the record shows that there is no question involved of which this court has jurisdiction under the laws of the United States conferring appellate jurisdiction upon it in cases prosecuted by writ of error from the courts of final resort in the states.

3. And this defendant in error, as authorized to do by the rules of this court, joins with the foregoing motion to dismiss the motion to affirm the judgment of the court below, because it manifestly appears from the record that this writ of error is prosecuted only for delay.

4. In support of these motions, the defendant in error presents herewith a printed brief, containing a full statement of the record and points and authorities, as required by the rules of this court, and shows that a copy of these motions and of such printed argument has been duly served, as required by the rules of this court, on the attorneys of record of the plaintiffs in error.

WARNER, DEAN & HAGERMAN,

Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

JAMES T. THORNTON,
Defendant in Error,
vs.
JOEL D. SUGG, AND E. C. SUGG & BRO.,
Plaintiffs in Error.

Error from the Supreme Court of Texas.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

This cause is brought here on a writ of error seeking to reverse the judgment of the Supreme Court of Texas in affirming the judgment of the District Court of Cook County, Texas, in overruling a motion made by Joel D. Sugg, one of the plaintiffs in error, to set aside a judgment previously rendered by the said district court in favor of the defendant in error and against E. C. Sugg and Brother, a co-partnership composed of E. C. Sugg and said Joel D. Sugg. The motion now made in this court to dismiss the writ of error is based on the ground of want of jurisdiction in this court to review the judgment of the Supreme Court of Texas, in that no federal question was raised or decided in the court below, and also upon the

ground that it manifestly appears from the record that the writ of error is prosecuted for purposes of delay only, and because no substantial question which can be decided by this court arises upon the record. While the writ of error, which issued from this court recites that there was drawn in question in the court below the validity of the statutes of the State of Texas on the ground of their being repugnant to the Fourteenth Amendment to the Constitution of the United States, providing that no statute shall deprive any person of property, without due process of law, and that the decision of the court below was in favor of the validity of said statutes, yet the statutes of the State of Texas are not specified in any way.

The specifications of error assigned by the plaintiffs in error in this court, E. C. Sugg & Brother, are as follows:

"*First*—J. D. Sugg and E. C. Sugg, being partners under the name of E. C. Sugg & Bro., and J. D. Sugg being a citizen of Wyoming, and not having been personally served with citation in the State of Texas, and not having entered an appearance, the service of citation upon E. C. Sugg alone in the State of Texas will not, under the Fourteenth Amendment to the Constitution of the United States, support a personal judgment against the partnership under which its property may be seized and sold.

"*Second*—Article 1224 of the Revised Statutes of Texas, providing that in suits against partners, service upon one partner will authorize a judgment

against a firm, is repugnant to the Fourteenth Amendment to the Constitution of the United States, when it is sought, as in this case, to sustain thereunder a personal judgment against a firm composed of a citizen of the State of Texas and a citizen of another state, upon a contract not executed in Texas, or to be performed therein, and when the firm is not shown to have property or to have transacted business in Texas, and when only the resident partner has been served with citation.

"*Third*—Article 1230 of the Revised Statutes of Texas, providing that service upon defendants without the State of Texas may be had by notice served upon them by any person competent to make affidavit, and authorizing personal judgment against such non-resident defendants, under which this judjment is sought to be sustained, is repugnant to the Fourteenth Amendmentt to the Constitution of the United States, and does not authorize any judgment affecting the partnership property of J. D. Sugg, not brought within the custody of the court by attachment or otherwise.

"*Fourth*—The judgment, in so far as it affects the partnership property of E. C. Sugg & Bro., or J. D. Sugg's interest therein, is a personal judgment upon substituted service affecting the property of a citizen of Wyoming, and is not due process of law as contemplated by the Fourteenth Amendment to the Constitution of the United States.

"*Fifth*—The pretense, in the opinion of the court, that J. D. Sugg by agreement submitted the

question of partnership debt or not to the District Court of Cooke County upon *ex parte* affidavits is not supported by the record, and was a device and pretense to avoid a direct decision of the validity or invalidity of the statutes of Texas authorizing a judgment against a partnership upon service upon one partner only, and judgment against citizens of other states upon substituted service perfected beyond the limits of Texas.

"*Sixth*—The judgment is not due process of law under the Fourteenth Amendment to the Constitution of the United States, because J. D. Sugg, the non-resident partner, was not served with citation in Texas, but was denied the opportunity of showing that the claim sued on was not in fact the debt of E. C. Sugg & Bro."

The sections of the statutes of the State of Texas referred to in the foregoing specifications of error, are as follows:

"Art. 1224. Against Partners. In suits against "partners the citation may be served against one of "the firm, and such service shall be sufficient to "authorize a judgment against the firm and against "the partner actually served."

"Art. 1230. Notice to Defendants Without the "State. Where the defendant is absent from the "state, or is a non-resident of the state, the clerk "shall, upon the application of any party to the "suit, his agent or attorney, address a notice to the "defendant, requiring him to appear to answer the "plaintiff's petition at the time and place of th

"holding of the court, naming such time and place. "Its style shall be 'The State of Texas,' and it shall "give the date of the filing of the petition, the file "number of the suit, the names of all the parties "and the nature of the plaintiff's demand, and shall "state that a copy of the plaintiff's petition accom- "panies the notice. It shall be dated, and signed, "and attested by the clerk, with the seal of the "court impressed thereon, and the date of its issu- "ance shall be noted thereon; a certified copy of the "plaintiff's petition shall accompany the notice."

It may be conceded that the writ of error and the assignments of error, point towards a federal question, yet a careful and minute inspection of the record fails to show that any federal question was raised, either in the District Court of Cooke County, Texas, or in the Supreme Court of Texas. It is well settled that a federal question cannot be raised for the first time in this court, but the record must show that it was raised and decided in the court below.

STATEMENT OF THE RECORD.

It appears from the record, that on October 6, 1885, James T. Thornton filed his petition in the District Court of Cooke County, Texas, against several parties, and among them were E. C. Sugg & Bro., a co-partnership composed of E. C. Sugg and Iker Sugg, the first of whom, it was alleged in said petition, resided in Tarrant County, Texas, and the other in Johnson County, Wyoming, outside of the State of Texas. The suit was brought

on a promissory note for $26,964.05, dated December 1, 1884, and due six months after date, payable to plaintiff with interest thereon, from maturity, at the rate of 10 per cent per annum. The prayer of the petition asked, in conformity to the law of Texas, a citation to the defendants and a notice to the defendant Iker Sugg, as provided by section 1230 of the revised statutes, and for judgment for the amount of the note, and for costs and for general and special relief. All of the defendants, including E. C. Sugg, were served in Texas.

The statutes of the State of Texas authorize a co-partnership to be sued as such, and further provides that service on one of the partners shall be good as against the partnership, and where one partner is served the judgment shall only be good against the partner served. (See Art. 1224, Texas statutes, hereinbefore set out.)

At the term of the District Court of Cooke County, held on November 6, 1885, a judgment was rendered in said court in words and figures as follows:

"This day came the plaintiff by his attorney, and the defendants having failed to appear and answer in this behalf, but wholly made default, wherefore, the said James T. Thornton, plaintiff, ought to recover against the said J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg & Bro., a co-partnership composed of E. C. Sugg and 'Iker,' or J. D. Sugg, the said 'Iker' Sugg and J. D. Sugg being one and the same person, and E. C. Sugg, the partner served, defendants, his damages by

occasion of the premises, and it appearing to the court that the cause of action is liquidated and proved by an instrument of writing, it is ordered that the clerk do assess the damages sustained by said plaintiff; and the said clerk now here having assessed the damages aforesaid at the sum of twenty-eight thousand, one hundred and thirty-four dollars and ninety-nine cents; it is adjudged by the court, that the said plaintiff do have and recover of the said defendants the sum of twenty-eight thousand, one hundred and thirty-four dollars and ninety-nine cents, with interest thereon at the rate of ten per cent per annum, together with his costs in this behalf expended, and that he have his execution.

"It is further ordered by the court that execution issue for the use of the officers of court, against each party respectively for the costs by him in this behalf incurred."

It will be noticed that this judgment, in the light of the Texas law, and as subsequently specifically held in this case by the Texas courts, was only a judgment against the partnership and E. C. Sugg, the partner served.

Afterwards, at the same term of said district court, and on December 5, 1885, Joel D. Sugg filed the following petition to set aside said judgment in said cause:

"Now comes Joel D. Sugg, a citizen of the Territory of Wyoming in the United States of America, and appearing for the purpose of vacating the pretended judgment by default rendered in this

cause on the 6th day of December, 1885, so far as the same affects him, or the partnership of E. C. Sugg & Bro., for the purpose of contesting the jurisdiction of this court to render any personal judgment affecting the property of this defendant owned by him in his own right or as a member of the partnership of E. C. Sugg & Bro., respectfully alleges that this petitioner and E. C. Sugg are and have for many years been partners under the name and style of E. C. Sugg & Bro., and that this petitioner and the said E. C. Sugg compose the firm of E. C. Sugg & Bro. sought to be bound by said judgment, and that there is not and has never been any partnership under the name of E. C. Sugg & Bro. composed of any persons except this petitioner and the said E. C. Sugg. That at the time of the institution of this suit this petitioner was a citizen and resident of said Territory of Wyoming, and is now and has ever since been such citizen and resident, and that at the time of the institution of said suit the plaintiff, James T. Thornton, was a citizen and resident of the State of Missouri, and has ever since been such citizen and resident, and that the Traders Bank mentioned in the note sued on as its place of payment is and has ever been situated in Kansas City in said State of Missouri, and that the District Court of Cooke County, Texas, is wholly without jurisdiction to render any personal judgment upon said note upon which the property of this petitioner owned in his own right and in connection with others can be seized or taken. That the consideration for the note sued on was money lent by the plaintiff to the defendant, J. W. Sacra, and that said note

was executed in renewal of a former note for said borrowed money; that said former note was signed by the defendants, J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg, as makers, but the said J. W. Sacra was the principal in said note, to whom said money was in fact lent, and the said Wilson, Cloud and Sugg were merely his sureties, all of which was well known to the plaintiff at the time of the execution and delivery of said note; and that after the maturity of said note, the note now sued on was executed in renewal of the same, and that said Sacra is the principal in the note sued on and the other makers thereof merely his sureties; all of which was well known to the plaintiff at the time of the execution and delivery of said note; that neither the note sued on or any note for which it was given in renewal is or ever was a partnership debt or liability of said E. C. Sugg & Bro., and that this petitioner did not execute the note sued on or authorize anyone else to sign or execute the same for him, or authorize anyone to sign the partnership name of E. C. Sugg & Bro. thereto, and that no one had the right or power to sign the partnership name of E. C. Sugg & Bro. thereto, or to make the said partnership in any manner liable thereon.

"That this petitioner is advised and believes that said E. C. Sugg signed the name of E. C. Sugg & Bro. to said note as the surety of said Sacra without intending to bind said partnership thereon or anyone else but himself; but, be that as it may, this petitioner in no manner authorized said E. C. Sugg or any other person to sign said partnership name to said note, and never in any manner ratified or

confirmed the execution of said note as aforesaid, and that said note was not executed in the partnership business of E. C. Sugg & Bro. or within the scope of said business.

"That said E. C. Sugg & Bro. was a partnership engaged in the business of the purchase, sale and raising of cattle, and in no other business, and that the execution of notes as security for others was wholly without the scope of said business, and neither partner has or ever did have the right or power to use the firm name as security for others, and this petitioner was never consulted in reference to the execution of the note sued on, and did not in fact know that the same was executed until long after the maturity of the same, and said note is not and has never been a debt of the said partnership of E. C. Sugg & Bro., but the individual debt of said Sacra, and was never in any manner assumed by said partnership.

"That the true name of this petitioner is Joel D. Sugg, and while he is sometimes called 'Ikard Sugg' he is never called 'Iker Sugg' or 'I. D. Sugg,' and that the petition and proceedings in this cause do not authorize a judgment against 'I. D. Sugg' or a partnership composed of 'I. D. Sugg and E. C. Sugg,' and that there is a fatal variance in this respect between the petition and the pretended judgment by default.

"That this petitioner did not have any notice of this suit, and that even if a citizen of Missouri, could maintain a personal action in the courts of Texas against a citizen of Wyoming upon a note payable in Missouri, which is not admitted, but de-

nied. The pretended notice in this case is wholly void and of no effect, because the same was issued without authority of law and without any affidavit of the non-residence of this petitioner being made or filed in this cause, and the pretended return thereon is wholly insufficient, because it is not shown where said pretended service was made upon this petitioner, and that at the time of the rendition of said pretended judgment this defendant was in the said Territory of Wyoming, and did not know of the rendition of said pretended judgment until he reached Texas, on the 30th day of November, 1885.

"That said partnership of E. C. Sugg & Bro., owned cattle and other personal property in the State of Texas, in which this petitioner and the said E. C. Sugg are jointly interested, but the said partnership is largely in debt, and all of said partnership property is necessary to pay said partnership debts, and that at the time of the institution of this suit the plaintiff well knew that said note was not a partnership debt of said E. C. Sugg & Bro., but at most was merely the individual debt of said E. C. Sugg, and that the partnership property of said E. C. Sugg & Bro. was necessary for the payment of its partnership debts, but that the plaintiff, intending and designing to cheat and defraud said partnership, and to obtain satisfaction of the individual debt of said E. C. Sugg out of said partnership property, to the exclusion of partnership creditors, did procure the rendition of said pretended judgment by default, and if said judgment is permitted to stand the plaintiff will sacrifice the property of said partnership and prevent the application of

said partnership property to the payment of partnership debts.

"Wherefore this petitioner prays that said judgment be set aside, and that he be allowed to make his defense to said action, and for all such further relief as he may be entitled to in the premises."

The said petition was verified by said Joel D. Sugg.

In support of said petition there was also filed the following affidavits:

"I, J. W. Sacra, one of the defendants in the above cause, on oath, say, that I am the principal in the note sued on, and the other makers are merely my sureties; that the consideration for said note was money lent by plaintiff to me, and used by me in my own business, and that plaintiff knew at the time of the execution of said note that I was the principal therein and the other makers were my sureties; that said note is not a partnership debt of E. C. Sugg & Bro., and if Joel D. Sugg, the other partner, ever authorized said signature, I never knew it or was informed of it.

[Signed] "J. W. Sacra."

"We, Isaac Cloud and J. W. Wilson, two of the defendants in the above cause, on oath, say, that as stated in the annexed motion, the consideration for the note sued on was money lent by the plaintiff to the defendant, J. W. Sacra, and that the said Sacra is the principal in said note, and the other makers thereof merely his sureties, and that said note

is not and was never a debt or liability of the partnership of E. C. Sugg & Bro., and the said partnership name was signed to said note as surety for said J. W. Sacra.

[Signed] "Isaac Cloud.
"J. W. Wilson."

"I, E. C. Sugg, one of the defendants in this cause, on oath, say that the note sued on was given in renewal of a former note, signed by J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg, payable to the plaintiff, and for money lent by plaintiff to said J. W. Sacra, and that said Sacra was the principal in said note and the other makers, including myself merely his sureties, and that the note sued on was given in renewal of said former note, and for no other or different consideration, and that at the time the note sued on was signed E. C. Sugg & Bro., it was presented to me by J. W. Sacra, and as I was preparing to sign it, said Sacra remarked to me, 'Sign it E. C. Sugg & Bro.,' and I did so without thinking much of the matter and without reflecting that the partnership name could not be used in that way, but without any intention of injuring or defrauding anyone. Said note is not a partnership debt of said E. C. Sugg & Bro., and never was, and said partnership name was signed to said note as security for said Sacra, outside of the scope of said partnership business, without the knowledge or consent of Joel D. Sugg, the other partner. [Signed] "E. C. Sugg."

At the same time, on December 21, 1885, the plaintiff filed the following reply to the petition to set aside the judgment:

"Now comes the plaintiff in the above cause, and replying to the motion of the defendants to vacate and set aside said judgment by default in this cause, shows to the court that the defendant, Iker Sugg or J. D. Sugg is the brother and partner of E. Sugg, and the two compose the firm of E. C. Sugg & Bro.; that defendant, J. D. Sugg is, and has been for many years, commonly known and called 'Iker Sugg;' for a long time he made his headquarters at Gainesville in Cooke County, Texas, he and the said E. C. Sugg both being unmarried men and having no settled home, but have for many years had a cattle ranch in the Indian Territory, and both are well known in Gainesville, Texas; that the said E. C. Sugg is known and familiarly called 'Cal' Sugg, and the defendant J. D. Sugg is, and has for a long time, been familiarly known and called 'Iker' Sugg among his friends and acquaintances, but few of them ever knowing his real name, but that 'Iker' Sugg and J. D. Sugg are one and the same person, and is the defendant in this cause that was duly served with process herein by H. S. Elliott on the 16th day of October, 1885, as appears of record in this cause, which process and return are hereto attached, marked 'Exhibit A' and made part of this reply; said defendant, J. D. Sugg, is not the business man of the firm, but knows nothing of the same; that he writes poorly, and that from an inspection of his signature it is im-

possible to tell whether the same is 'J. D.' or 'I. D.,' but the clerk in entering the judgment in this cause has made the letters as near as possible like the signature of the said defendant, and should the court believe, upon an inspection of the record, that the name is 'I. D.,' and that it should be 'Iker' or '"J." D.,' plaintiff prays the court to permit the said judgment to be so amended and corrected as to make it show said defendant's true name, or the one he is commonly known by, but that the party named in the judgment is a member of the firm of E. C. Sugg & Bro., the one so charged in the petition in this cause and the one served with process as aforesaid is one and the same person, as shown by 'Exhibits' 'B' and 'C,' hereto attached and made a part of this reply.

"Plaintiff further shows to the court that there is no personal judgment taken in this cause against the defendant Iker or J. D. Sugg, but that said judgment is against the firm, and E. C. Sugg by reason of service in Texas on said E. C. Sugg, who was legally served, as shown by the record, in Tarrant County, Texas, the place of his residence, on the 8th day of October, 1885; that said firm of Sugg & Bro. have a large cattle ranch in Texas, with headquarters in Donley County, consisting of lands and cattle; that they have one also in the Indian Territory and still another in Wyoming Territory, all of the value of about one million dollars. That they have mortgaged the Wyoming ranch for a large sum to whom they owe but little for the purpose of defrauding their creditors; that they have contracted a sale of their lands in Texas, and are

preparing to remove their cattle to the Indian Territory, out of the jurisdiction of the courts of Texas, in order to avoid the payment of their debts; but that after the rendition of the judgment in this cause the plaintiff had the same abstracted and duly recorded in Donley County, Texas, thereby establishing a lien upon said lands of defendants, and after the expiration of the twenty days allowed by law after the rendition of said judgment, obtained an execution and placed the same in the hands of the sheriff of Donley County, Texas, and ordered it executed; that the said defendants frequently met plaintiff and his counsel and talked with them in regard to said judgment and its payment, but never at any time denied the justness of the same, and never claimed that the note was signed by one partner without the consent of the other, and without power to bind the firm until the above steps were taken to enforce the payment of the same as above set forth.

"Wherefore, plaintiff says that the want of authority to bind the firm is charged in said motion for the fraudulent purpose of relieving defendants' property from the payment of said judgment, and not because the same is true in fact, for that he says that both of the members of said firm were duly served with a copy of plaintiff's petition in this cause, and well knew long before the taking of said judgment the character of the note sued upon, but made no attempt to make any defense to the same, and show no excuse for not so doing. Plaintiff shows the court that the said firm have for a long time done a large business and borrowed large

amounts of money, in doing so the said E. C. Sugg has always acted for the firm, he being its business man as aforesaid, and has on many occasions procured the signatures of the defendant Sacra, and also Cloud, and Wilson, as well as many others to sign as sureties the said paper of said firm, and has on numerous and sundry occasions, in returning the accommodation to said parties who also desired to borrow money, signed the name of E. C. Sugg & Bro. as sureties for the same, all of which facts were well known to said 'Iker' Sugg and acquiesced in by him, and plaintiff had no knowledge or means of knowing the want of authority in E. C. Sugg to sign said note; that it would have been almost impossible for said firm to have run its business without the giving of such security, and it being a custom among cattle men in this portion of Texas to go security for those who went theirs; it was in the contemplation of the partnership to do so, for plaintiff shows that it is also a custom among said cattle men that where a loss was occasioned by reason of one member thereof going security in order to be able to give security when desired, that the firm in all such cases have paid the loss, and that all loss occasioned by either member of the firm of E. C. Sugg & Bro. in this way has always been considered a firm debt and paid by said firm, and if this fact be denied by said Sugg & Bro., plaintiff prays the court to hear proof on the same.

"Further, plaintiff shows that at the time of the execution of the note sued on in this case, that defendant, J. W. Sacra, and defendant E. C. Sugg

& Bro., were partners and as such partners owned the property, both real and personal, now situated in Donley County, Texas, and which the plaintiff is attempting to subject to the payment of his debts, and while plaintiff does not know, he is informed that the money loaned by him, for which the note sued on is given, was used for the benefit of said last firm of Sacra, and Sugg & Bro., but he says that long after the maturity of said note, the said Sacra sold and transferred all of said property to E. C. Sugg & Bro., and that said E. C. Sugg & Bro. knew at said time that said note was due and unpaid; plaintiff is not aware who are the real principals on said note, but he shows to the court that said note was executed in the State of Missouri, and is payable in said state, and that upon the face of said note all parties appear to be principals, and that under the law of said state none can be shown to be sureties except where they sign as such, and if the right to do so in Texas ever existed to the parties in this case, the same was waived by them not doing so within the time provided by law to answer; all of such facts are shown by affidavits hereto attached, marked 'Exhibits' 'B,' 'C' and 'E.'

"Wherefore plaintiff prays the court to correct said judgment by interlining therein a firm composed of E. C. Sugg and 'Iker' or J. D. Sugg the said 'Iker' and 'J. D.' Sugg being one and the same person, and upon such correction to overrule said motion and sustain said judgment, and will ever pray, etc."

Attached to said reply, as "Exhit A," was a citation issued to "Iker" Sugg, residing in Johnson

County, Wyoming Territory, on which was endorsed a return under oath, showing that it was delivered to Iker Sugg in person on the 16th day of October, 1885, together with a certified copy of the plaintiff's petition.

In support of said reply, the following affidavit of P. S. Witherspoon, J. R. Stevens and John D. Washington, was filed:

"Before me, the undersigned authority, personally appeared P. S. Witherspoon, J. R. Stevens and Jno. D. Washington who, on oath, say that they are acquainted with J. D. Sugg, a member of the firm of E. C. Sugg & Bro., and have known him for several years; that we are stockmen and have associated with him in the cattle business; that said firm of E. C. Sugg & Bro. have for a long time had a ranch in the Indian Territory and now have one in Texas; and, also, we understand, have one in Wyoming Territory. That E. C. Sugg has been the manager of the business of the Texas and Indian Territory ranches and has been the financial man of the firm; that said J. D. Sugg, the brother and partner of E. C. Sugg, is and has for a long time been commonly known and called 'Iker' Sugg, and is now generally known by that name, and is never known, so far as we are aware, by the name of Joel Sugg; said 'Iker' Sugg, for a long time was located on the ranch in the Indian Nation; is now located on the Wyoming ranch, but has been in Gainsville, Texas, for a long time.

[Signed] "P. S. WITHERSPOON.
"J. R. STEVENS.
"JOHN D. WASHINGTON."

Also, the following affidavit of C. L. Potter:

"Before me, the undersigned authority, personally came and appeared C. L. Potter, one of plaintiff's attorneys who, on oath, says that the plaintiff Thornton, resides in Kansas City, Missouri, and is not now present at this term of court. I have known 'Iker' Sugg for some seven or eight years; he and E. C. Sugg have been prominent stock men in this portion of Texas and the Indian Territory, and are known by most all stock men and business men in this part of North Texas; that 'Iker' Sugg has been in and about Gainesville, Texas, a great deal, he and his brother, E. C. Sugg, both being unmarried men; E. C. Sugg has always been the business man of the firm and attended to their money affairs; J. D. Sugg has, ever since I first knew him, been generally and commonly called and known as 'Iker' Sugg; I never heard him called 'Joel' Sugg until the filing of the motion by him in this cause; I have heard some few men call him 'Ikard' Sugg, but have heard his intimate friends correct them and inform such parties that the name was 'Iker' and not 'Ikard.' A great many cattle men have their homes in and about Gainesville, Texas, and, in fact, it has rather been the home of the cattle men. I have heard many of them speak of J. D. Sugg, but never heard any of them call him 'J. D.,' but always 'Iker,' or 'Ikard,' and generally 'Iker.' In conversation with him I have generally called him 'Iker,' and I have talked with him frequently in the last six or seven years. I know that 'Iker' Sugg is the partner of E. C.

Sugg, and a member of the firm of E. C. Sugg & Bro., and is the same party served in Wyoming. I have seen him since the service and talked with him about it. I have seen his signature several times and always thought it to be 'I.' D. instead of 'J.' D. from the manner in which he made the first letter, and might have been also influenced to such a belief by reason of the fact that I knew he was called 'Iker.' I know that Sugg & Bro. have property in Donley County, Texas, from what they have told me. The judgment in this case has been abstracted and recorded in that county and execution issued in the case. I have talked several times to E. C. Sugg in regard to it, and once to 'Iker.' Never heard of a want of authority to sign the note until after I refused to cancel the judgment lien on the land. I have heard both Sugg Bro. and Sacra say that they were partners and owned the land and cattle in Donley County, and that Sacra had sold the same to Sugg since the maturity of the note sued on in this case.

"The judgment in this case was taken on the regular call of the appearance docket like other default judgments; no fraud was committed in regard to the same. I told defendants about it long before the execution issued and no objection was made to it.

[Signed] "C. L. Potter."

Also a copy of the note sued on and of the certificate of the notary protesting the same. Also the following affidavit of M. W. St. Clair:

"M. W. St. Clair, being duly sworn, on his oath, says: That he is cashier of the Traders Bank of Kansas City, Missouri; that he has carefully examined the books of said bank, and that it does not appear therefrom that said bank ever had in its possession, at any time, a note signed by J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg, neither does it appear that said bank ever had in its possession a note signed by E. C. Sugg, together with said Wilson, Sacra and Cloud, except the one in judgment herein, whereupon said Sugg's name appears as follows: 'E. C. Sugg & Bro.' And further affiant saith not.

[Signed] "M. W. St. Clair."

Also the following affidavit of plaintiff, James T. Thornton:

"James T. Thornton, being duly sworn, on his oath, states: That he is the plaintiff in the above entitled cause, and is also president of the Traders Bank of Kansas City, Missouri; that the note on which the judgment in this cause was obtained was not given in renewal of a note signed by J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg, but was given by the defendants just as appears from the face of said note.

"That this plaintiff did not secure the judgment herein to cheat, swindle or defraud the partnership of E. C. Sugg & Bro. or any person or persons whomsoever. Affiant says that he is not trying to sacrifice the property of said partnership, or prevent the application thereof to the partnership debts, if any, but that said judgment was obtained

honestly, in good faith, for the purpose of collecting a just debt and for no other purpose.

"That neither this affiant, nor the Traders Bank of Kansas City, Missouri, nor any person for them, or either of them, has ever held or had in his possession or their possession, or the possession of any one of them, any note signed by E. C. Sugg alone, together with the above named other defendants, J. W. Sacra, J. W. Wilson and Isaac Cloud, and the only notes this affiant has seen, upon which the name of E. C. Sugg appeared at all, together with said defendants, has appeared as follows: 'E. C. Sugg & Bro.,' and in no other way whatsoever. And further affiant saith not.

[Signed] "JAS. T. THORNTON."

Also the following affidavit of W. O. Davis:

"I, W. O. Davis, on oath, say: That I have been acquainted with the defendant, J. D. Sugg, for about eight or ten years, and during that time I have seen him frequently, and have been his attorney, and as such have written contracts and agreements for him and have seen him sign his name. In speaking to or of him, I have always called him 'Ikard,' and I have frequently seen him in company with his friends and acquaintances and they addressed him as 'Ikard.' I have no recollection of ever hearing him called 'Iker.' In signing contracts and papers he always signed his name, according to the best of my recollection, 'J. D.' Sugg. Several years ago, while I was writing a contract for him, he explained to me that 'Ikard' was not his real

name, but merely a nickname, and that his name was J. D. Sugg.

[Signed] "W. O. DAVIS."

Also the following affidavit of J. H. Garnett:

"I, J. H. Garnett, on oath, say: That I have been well acquainted with the defendant, J. D. Sugg, for at least three years, and during that time I have frequently seen him in company with his friends and acquaintances. I always spoke to and of him as 'Ikard' Sugg, and his friends and acquaintances addressed him as 'Ikard Sugg.' I have no recollection of ever hearing him called 'Iker.'

[Signed] "J. H. GARNETT."

Upon the hearing of said petition or motion to set aside the judgment, at the same term of court, there was made the following orders or judgments:

"Now on this day came to be heard the motion of the defendant, 'Iker Sugg,' or J. D. Sugg, to vacate and set aside the judgment by default, as to him and the co-partnership of E. C. Sugg & Bro., rendered in this cause on the 6th day of November, A. D. 1884; and also at the same time came on to be heard the motion of the plaintiff to correct said judgment and replying to said Sugg's motion to vacate said judgment; and the court, after hearing said motions, is of the opinion that the law is for the plaintiff, James T. Thornton, and that 'Iker Sugg' and J. D. Sugg is one and the same person, and that said judgment should be amended and cor-

rected as requested in plaintiff's motion for that purpose.

"It is, therefore, ordered, adjudged and decreed by the court, that said judgment be so amended and corrected as to read after the words 'E. C. Sugg & Bro.,' a co-partnership composed of E. C. Sugg and 'Iker' or J. D. Sugg—the said 'Iker Sugg' and J. D. Sugg being one and the same person—and that the clerk of this court insert the same in the original judgment herein. To all of which the said J. D. Sugg in open court excepted."

"Now on this day came on to be heard the motion and application of J. D. Sugg, filed in this court on the 4th day of December, 1885, to set aside and vacate that certain judgment rendered in the above entitled and numbered cause on the 6th day of November, A. D. 1885; also came on to be heard the replication of plaintiff to said motion, at the same time, and the court, after hearing the said motion and plaintiff's replication thereto and the argument of the counsel, and being fully advised in the premises, there being no other evidence in favor of said motion or in favor of the replication thereto, except the affidavits attached to said motion and the affidavits attached to plaintiff's replication, it is the opinion of the court that the law is for the plaintiff.

"It is, therefore, considered by the court that said motion to vacate said judgment be and the same is hereby overruled. To which ruling of the court the said J. D. Sugg and E. C. Sugg & Bro. excepted, and in open court gave notice of an appeal to the Supreme Court of the State of Texas."

At the trial of said petition or motion the defendant, Joel D. Sugg, asked leave to file an answer in words as follows:

"Now comes the defendant, Joel D. Sugg, called in plaintiff's petition, Iker Sugg, and for himself and said partnership of E. C. Sugg & Bro., says that the note sued on and described in plaintiff's petition is not the act and deed of this defendant or the said E. C. Sugg & Bro., and that this defendant did not execute said note or authorize anyone else to execute the same for him, and that said partnership of E. C. Sugg & Bro. did not execute said note or authorize anyone else to execute the same for it, and that said note is not the note and obligation of E. C. Sugg & Bro.; and of this, this defendant and the said E. C. Sugg & Bro., put themselves upon the country and pray that they be discharged with their costs."

On December 23, 1885, the defendants, J. D. Sugg and E. C. Sugg & Bro., filed an assignment of errors in the district court as follows:

"Now comes the defendants, J. D. Sugg and E. C. Sugg & Bro., and assign errors as follows:

"1. The court erred in overruling the motion of defendant, J. D. Sugg, to vacate the judgment herein.

"2. The judgment is erroneous in not showing any disposition of the case as to defendant, J. D. Sugg, otherwise called 'Iker Sugg.'

"3. Though defendant, J. D. Sugg, was a

party to this suit, there was no discontinuance as to him or any disposition of the case as to him in said judgment.

"4. The record shows that the court had no jurisdiction of defendant J. D. Sugg,

"5. The pretended notice served upon defendant, J. D. Sugg, was without authority and a nullity.

"6. The court erred in permitting the judgment herein to be corrected."

These assignments of error were filed with the clerk of the District Court of Cook County, Texas, pursuant to the positive requirement of the following statute of Texas:

"Article 1037. ASSIGNMENT OF ERRORS. The "appellant or plaintiff in error shall, in all cases, "file with the clerk of the court below an assign- "ment of errors, distinctly specifying the ground "upon which he relies, before he takes the tran- "script of the record from the clerk's office. A "copy of such assignment of errors shall be attached "to and form a part of the record; all errors not "so distinctly specified shall be considered by the "supreme court or court of appeals, as waived."

The said defendants, J. D. Sugg and E. C. Sugg & Bro., appealed the case to the Supreme Court of Texas.

On deciding the appeal, on May 8, 1888, the Supreme Court of Texas delivered the following opinion which is certified as part of the record in this cause:

"Suit by appellee on a promissory note payable to him, signed by J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg & Bro. Sacra, Wilson, Cloud and E. C. Sugg were residents of this state and each was regularly served with citation. J. D. Sugg, who was a member of the partnership of E. C. Sugg & Bro., resided in Wyoming, and process was taken for him to be executed as provided for in Arts. 1230 to 1234 of Revised Stat. Both in the petition, and the process issued against him, J. D. Sugg was called 'Iker Sugg.' The citation and certified copy of the petition were served upon him on the 16th day of October, 1885. On November 6, 1885, none of the defendants having answered, and before the return of the service upon J. D. Sugg, judgment, by default, was rendered against Sacra, Wilson, Cloud and E. C. Sugg, individually, and against the partnership of E. C. Sugg & Bro., composed of E. C. Sugg and 'J. D. Sugg,' but no order was made nor judgment entered as to 'Iker' or 'J. D. Sugg' individually."

On December 5, 1885, "J. D. Sugg" filed a motion to vacate the judgment so far as it affected him, and his individual property, and so far as it affected the property of the partnership of E. C. Sugg & Bro. The grounds stated in the motion were: That the note was not given for a partnership liability of his firm, but that the firm name was signed thereto, as surety for Sacra, and without authority, it being outside the scope of the partnership.

That the judgment did not dispose of the case as to him.

That his name was not "Iker" or I. D. Sugg, but J. D. Sugg, sometimes called "Ikard Sugg."

That the partnership of E. C. Sugg & Bro. owned property in the State of Texas and was largely indebted, and that the assets of the firm would be required to pay its debts.

The motion was sworn to by appellant, and E. C. Sugg made affidavit that he signed the firm name without authority, and that the note was given for money loaned Sacra, all the other makers being sureties only.

Affidavits of others were filed to the effect that Sacra was principal and other makers were sureties, and that appellant's name was J. D. Sugg, sometimes called "Ikard Sugg," but never called "Iker Sugg."

In reply to this motion, appellee filed an answer asking that judgment be corrected as to the name of appellant, and alleging that appellant and Iker Sugg were one and the same person, who, with E. C. Sugg, composed the partnership of E. C. Sugg & Bro.; that E. C. Sugg & Bro. owned property in Texas, Wyoming and the Indian Territory, of the value of about a million dollars, and that they were attempting to dispose of their property with intent to defraud their creditors; that plaintiff had obtained a judgment lien against their real estate in Texas; that said defendants frequently met plaintiff and his counsel and talked to them about said judgment and its payment, but never claimed that the firm name was signed to the note without authority

until after they discovered that steps had been taken to subject their property to its payment; that the want of authority to bind the firm by the signature to the note was set up by appellant for the fraudulent purpose of relieving the property of defendants from the lien of the judgment, and not because the same is true in fact; that both members of the firm of E. C. Sugg & Bro. were served with copies of the petition long before the judgment was rendered, and they were fully advised of the character of the note sued on, but made no attempt to make any defense to the suit, and show no reason or excuse for not doing so; that it had been the custom of E. C. Sugg to sign the firm name as security or otherwise as he saw proper to do, and his right to do so had always been recognized by appellant, and liabilities so created had always been paid by the firm; that plaintiff had no knowledge or means of knowing the want of authority in E. C. Sugg to sign said note; that at the time the note was given Sacra and Sugg & Bro. were partners and owned the property in Donley County, Texas, which plaintiff is now attempting to subject to the payment of the judgment; that plaintiff is informed that the money for which the note was given was used for the benefit of the firm of Sacra and Sugg & Bro.; that after the maturity of the note, Sacra transferred all of said property to E. C. Sugg & Bro., and that Sugg & Bro. knew at the time that said note was unpaid. The answer asked that if the facts alleged be denied, that proof be heard thereon. Affidavits of several persons were filed in support of the averments of the answer. There

was no reply to this answer. The court overruled the motion to vacate and set aside the judgment, and entered an order directing the clerk to correct the judgment as asked by appellee, so as to give appellant's name correctly.

The allegations of the motion to set aside the judgment, if not denied nor contested, were sufficient to entitle appellant to have the judgment vacated, provided there had been no want of dilligence upon his part in failing to interpose the defenses set up in his motion, prior to the judgment. The material allegations of the motion were denied by the answer of appellee, and, without objection, the court proceeded to determine the issues upon affidavits filed by both parties. Appellant having thus submitted to a trial of the issues in that way, he cannot now be heard to complain of the result. Had objection been made to any inquiry save upon the question of diligence, it would doubtless have been sustained, and the court would have heard proof only on that question. It clearly appears that a copy of the petition was placed in the possession of appellant as early as the 16th of October before the judgment was rendered on the 6th of November, by which he was fully advised of the existence of the note and the character of the suit. He knew that his partner would be served with citation, and is presumed to have known that the law authorized judgment against his firm on such service. It is alleged in the answer to the motion, and the allegation is supported by affidavit, that both members of the firm of E. C. Sugg & Bro. conversed with appellee and his counsel about the

judgment and its payment, and nothing was said by either of them in regard to want of authority in E. C. Sugg to sign the firm name to the note until the motion to vacate was filed. The issues raised by the motion to set aside the judgment and the answer thereto, having been tried by the court below upon affidavits, without objection, as the affidavits are conflicting, we think the judgment should not be disturbed.

It is contended that the judgment is erroneous, because it makes no disposition of the case as to appellant.

The judgment is not against him, does not discontinue the case as to him, nor does it contain any allusion to him, except in the use of his name as descriptive of the partnership of E. C. Sugg & Bro.

If the judgment does not in terms or legal effect dispose of the case as to all defendants, it is not a final judgment, and this appeal could not be entertained.

Appellant was a non-resident of this state, and the court could acquire no jurisdiction of his person, except by his appearance and voluntary submission to the jurisdiction. This he might have done and made any defense to the suit that any citizen of this state would have been entitled to make. The judgment rendered was the only judgment that could have been rendered, and we think it a final judgment.

The court retained complete control of the judgment during the term at which it was rendered, and did not err in permitting it to be amended as to

the name of appellant, so as to correctly describe the partnership against which the judgment was rendered.

We find no error in the record requiring reversal, and are of the opinion that the judgment of the court below should be affirmed.

ACKER.

May 8, 1888.

"Report of Commission of Appeals examined, opinion adopted and judgment affirmed.

"STAYTON, Chief Justice."

And the Supreme Court of Texas thereupon entered the following judgment on May 8, 1888:

"This cause having been referred to the Commission of Appeals for their examination, and said commission having reported that there was no error in the judgment and that the same ought to be affirmed, and said report having been considered and the opinion adopted, it is considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, James T. Thornton, do have and recover of the appellants, J. W. Sacra, J. W. Wilson, Isaac Cloud, Joel D. Sugg, and E. C. Sugg & Bro., (a firm composed of E. C. Sugg and Iker, or J. D. Sugg, the said 'Iker' and 'J. D.' Sugg being one and the same person) and their sureties, F. M. Dougherty, L. G. Cairns and R. S. Rollins, the amount adjudged below, together with all costs in this behalf expended, and this decision be certified below for observance."

The motion for rehearing was made in the said court, and denied on December 21, 1888.

Afterwards, on January 9, 1889, the following petition for writ of error was filed in the Supreme Court of Texas by said Joel D. Sugg and the partnership of E. C. Sugg & Bro.:

"In the Supreme Court of Texas.

"JOEL D. SUGG, *et al.*, *Appellants*,

vs.

"JAMES T. THORNTON, *Appellee*.

"To the Honorable J. W. Stayton, Chief Justice of the Supreme Court of Texas.

"Your petitioners, Joel D. Sugg, a resident citizen of the Territory of Wyoming, and E. C. Sugg, a resident citizen of the State of Texas, and partners under the firm name of E. C. Sugg & Bro., complaining of James T. Thornton, a resident citizen of the State of Missouri, respectfully allege that said Thornton, claiming to be a citizen of the State of Missouri, instituted in the District Court of Cooke County, Texas, an action against J. W. Sacra, J. W. Wilson, Isaac Cloud and your petitioners, all being citizens of the State of Texas, except your petitioner, Joel D. Sugg, who was a resident of the Territory of Wyoming, to recover of them the contents of a promissory note for twenty-six thousand, nine hundred and sixty-four and 05-100 dollars, signed by said Cloud, Wilson, Sacra and E. C. Sugg & Bro., and seeking merely a personal judgment against the defendants. It was alleged in the petition that said note was executed by said partner-

ship of E. C. Sugg & Bro., but it was not alleged that said note was executed or payable in Texas, or that said partnership was formed in Texas, or transacted business or possessed property therein. Your petitioner, Joel D. Sugg, was not served with citation in Texas, and did not appear in said cause, but he was notified of the pendency of said suit by notice served upon him in the Territory of Wyoming under article 1230 of the Revised Statutes of the State of Texas, which provides that service upon defendant without the State of Texas may be had by notice served upon them by any person competent to make oath of the fact, and authorizing personal judgments against such non-resident defendants upon such service.

"Afterwards, on the 6th day of November, 1885, said James T. Thornton recovered in said District Court for Cooke County, Texas, in said cause, a personal judgment by default against said Sacra, Wilson, Cloud and E. C. Sugg & Bro., for the full amount of said note, including interest, and directing an execution to issue thereon to be satisfied out of the individual property of your petitioner, E. C. Sugg, and out of the partnership property of said E. C. Sugg & Bro., as required by article 1224 of the Revised Statutes of the State of Texas, which provides that in suits against partners, the citation may be served upon one of the firm, and such service will be sufficient to authorize a judgment against the firm and against the partner actually served; the notice served upon your petitioner, Joel D. Sugg, in Wyoming, as aforesaid, not having been at the time of the rendition of said

judgment returned into court so as to show service of any kind upon him. Before the adjournment of the term, your petitioner, Joel D. Sugg, and the partnership of E. C. Sugg & Bro., filed a motion in said cause to vacate said judgment, because, among other things, the service was such as authorized a personal judgment against E. C. Sugg alone, and not against the partnership, and that any attempt of the court to render a personal judgment under which the property of your petitioner, Joel D. Sugg, individual or partnership, could be sold upon service upon E. C. Sugg alone, or giving any effect to the notice served upon your petitioner, and that thereupon your petitioners filed a motion for a re-hearing in said cause, which was by the said supreme court on the 21st day of December, 1888, overruled and denied, and thereby the said judgment became and is the final judgment of the highest court of the State of Texas, and that the record in said cause (being No. 5629 on the docket of said supreme court at its Austin branch), called in question the validity of the aforesaid statutes of Texas, and of the judgment rendered thereunder on account of their being repugnant to the Fourteenth Amendment of the Constitution of the United States forbidding any state to deprive any person of property without due process of law, and the Supreme Court of Texas, by its said judgment of affirmance, sustained the validity of said statutes of the State of Texas.

"The defendants, said J. W. Wilson, Isaac Cloud and J. W. Sacra, being citizens of the State of Texas, and having no defense to said action, re-

fused and failed to join in said appeal from said district court to said Supreme Court of Texas, and that said Wilson and Cloud, though requested in writing by your petitioners to join them in the prosecution of a writ of error from the said judgment of the Supreme Court of Texas to the Supreme Court of the United States, have refused to do so, and that since the denial of said motion for re-hearing on the 21st of December, 1888, said Sacra has departed this life, leaving as his heirs his widow Mittie Sacra, and some infant children, whose names are not known to your petitioners, and that there is no administration upon the estate of said Sacra, and all of his heirs reside in the Indian Territory beyond the reach of any civil process.

"Wherefore your petitioners, Joel D. Sugg and the partnership of E. C. Sugg & Bro., seeking to annul said judgment, in so far as it affects the partnership of said partnership, or attempts to create a partnership liability, pray for a writ of error to the Supreme Court of the United States for the correction and revision of the many errors manifest in the record, and they pray for a citation in error as provided by law, and say that C. L. Potter, a resident of Cooke County, Texas, is the attorney of record of the said James T. Thornton.

"DAVIS & GARNETT,
"Attorneys for plaintiffs in error."

On said application, the Chief Justice made the following order, which was endorsed thereon:

"GALVESTON, January 9, 1889.

"This application for a writ of error has been examined, and without assenting to all the statements therein made as to what was decided, I allow the writ of error prayed for.

"JOHN W. STAYTON,

"Chief Justice of the Supreme Court of Texas."

On January 9, 1889, J. D. Sugg and E. C. Sugg & Bro., requested in writing, the following defendants in the judgment rendered by the Supreme Court of Texas, and from which this writ of error is prosecuted, namely, F. M. Dougherty, R. S. Rollins, L. G. Cairns, J. W. Wilson and Isaac Cloud, to join in the writ of error, and they all declined to do so.

The foregoing is a full and complete statement of the record, as we believe so far as necessary, for the full consideration of our motion to dismiss the writ of error or affirm the judgment of the court below.

IN THE

SUPREME COURT OF THE UNITED STATES.

JAMES T. THORNTON,
Defendant in Error,

vs.

JOEL D. SUGG, AND E. C. SUGG & BRO.,
Plaintiffs in Error.

POINTS AND AUTHORITIES.

It is clear, from the record in this case, that in the court below there was not drawn in question the validity of the Texas statutes relative to a service upon a co-partnership or a service of a writ of summons on a non-resident outside of the state, as being repugnant to the Fourteenth Amendment to the Constitution of the United States. It is equally clear that the decision of the court below, in this case, did not turn upon the validity or invalidity of those statutes. The judgment, which was sought to be set aside, was rendered by default upon service upon one of the partners in the state. The judgment was only rendered against the resident

partner, who was served in the state, and against the co-partnership as such. There was no judgment entered against the non-resident partner, who was served outside of the state. The fact of such service outside of the state did not appear until on hearing of motion to set aside this judgment, the non-resident partner, Joel D. Sugg, appeared at the term at which the judgment by default was rendered, and moved to set aside the judgment so far as it affected him and the co-partnership of E. C. Sugg & Bro., on the ground:

1. That the court had no jurisdiction.

2. That the note sued on, and on which the judgment was rendered, was signed in the partnership name by E. C. Sugg, but without authority of J. D. Sugg, and therefore, not binding on the partnership. In other words, the motion attacked the judgment at the term at which it was rendered upon jurisdictional and non-jurisdictional grounds.

The District Court of Cooke County, Texas, in this case as expressly found in the decision of the Supreme Court of Texas, in this case heard and decided the questions of meritorious defense raised by the motion to set aside the judgment without objection from either of the parties, and overruled the motion.

The testimony was conflicting upon the question whether the signing of the note sued on in the name of E. C. Sugg & Bro. was an authorized partnership act.

It is well settled by the authorities that where a party defendant in a suit appears at the term when judgment by default has been rendered against him, and moves to set aside or vacate the judgment on both jurisdictional and non-jurisdictional grounds, that he thereby appears to the action and is effectually bound by the decision upon upon his motion. The rule is well stated in *Burdette vs. Corgan*, 26 Kansas, 104, in an opinion pronounced by Judge BREWER, wherein he says:

"In the first place, we remark that this appear-"ance by a motion, though called special, was in "fact a general appearance, and by it this defendant "appeared so far as she could appear. The motion "challenged the judgment, not merely on jurisdic-"tional, but also on non-jurisdictional grounds, and "whenever such a motion is made the appearance is "general, no matter what the parties may call it in "their motion. Such a general appearance to con-"test a judgment on account of irregularities will, "if the grounds therefor are not sustained, conclude "the parties as to any further questioning as to the "judgment. The party cannot come into court, "challenge its proceedings on account of irregulari-"ties, and after being overruled, be heard to say "that he never was a party in court, or bound by "those proceedings. If he was not in fact a party "and had not been properly served, he can have the "proceedings set aside on the ground of want of "jurisdiction. But he must challenge the proceed-"ings on that single ground."

See to the same effect:

Cohen vs. Trowbridge, 6 Kas. 385.
Fee vs. Irencoe, 13 Ohio St. 563.
Grantier vs. Rosencrance, 27 Wis. 491.
Alderson vs. White, 32 Wis. 309.
Meixell vs. Kirkpatrick, 29 Kas. 679.
Kaw Valley Life Ass'n vs. Lemke, 19 Pac. Rep. 338. (Sup. Ct. Kansas.)

This was the view taken in this case by the Supreme Court of Texas. [See the opinion of that court hereinbefore set out.]

We specially call attention to the assignments of error made in the Supreme Court of Texas and hereinbefore set out. From these assignments it appears that the only errors assigned, touching the jurisdiction when the case was before the Supreme Court of Texas, was that the "record shows that the court had no jurisdiction of the defendant, J. D. Sugg," and "the pretended notice served upon defendant, J. D. Sugg, was without authority and a nullity." There was no assignment of errors in the Supreme Court of Texas that the court had no jurisdiction of the co-partnership of E. C. Sugg & Bro. Comparison between the assignment of errors in the Supreme Court of Texas, and the specification of errors made in this court, shows how clearly assignments raising a federal question are made in this court, but were not made in the court below. The court below expressly held that the judgment in question was not a judgment against Joel D. Sugg individually, and was not intended to be such.

Upon the proposition that the record in the court below must show that there was drawn in question the validity of the statutes of Texas on the grounds that they were repugnant to the Constitution of the United States, and that such question was decided in favor of the validity of the state statutes, we cite the following cases decided by this court:

Crowell vs. Randall, 10 Peters, 368.
Armstrong vs. Treasurer, 16 Peters, 281.
Lawler vs. Walker, 14 Howard, 149.
Maxwell vs. Newbold, 18 Wallace, 511.
Menenger vs. Mason, 10 Wallace, 507.
Hoyt vs. Sheldon, 1 Black, 518.
Spies vs. Illinois, 123 U. S. 131, 181.
Baldwin vs. Kansas, 129 U. S. 52–57.

And upon the point that it is not competent to first raise the question in the writ of error, or in the specifications or assignment of error in this court, we submit the same is so firmly settled as to need no citation of authorities in support thereof.

From the evidence in the district court, it quite clearly appears that there was a conflict of testimony upon the question whether the signature of E. C. Sugg & Bro. to the note sued upon, and upon which the original judgment in the court below was rendered, was a partnership act such as to bind the partnership, though we submit the weight of the testimony seems strongly in favor of the proposition that such signature was an authorized act.

The question was one of fact solely for the courts below, and cannot be reviewed here.

We respectfully submit that the writ of error should be dismissed, or the judgment below affirmed.

WILLIAM WARNER,
O. H. DEAN,
JAMES HAGERMAN,
Attorneys for Defendant in Error.

Office Supreme Court U. S.
FILED.
AUG 9 1889
JAMES. H. McKENNEY.
CLERK.

No.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

J. D. SUGG, ET ALS.,

PLAINTIFFS IN ERROR,

VS.

JAMES T. THORNTON, DEFENDANT IN ERROR.

ERROR FROM THE SUPREME COURT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

SAWNIE ROBERTSON,
W. O. DAVIS,
Attorneys for plaintiffs in error.

J. D. SUGG, ET ALS.,
No. vs.
JAMES T. THORNTON.

I.

On the 6th day of October 1885, James T. Thornton, a citizen of Missouri, brought suit in the district court of Cooke county, Texas, against J. W. Sacra, J. W. Wilson, Isaac Cloud, E. C. Sugg and J. D. Sugg, all of whom were citizens of Texas, except J. D. Sugg who was a citizen of Wyoming Territory. J. D. Sugg and E. C. Sugg were partners under the name of E. C. Sugg & Bro., and by this suit the platntiff sought to recover of the defendants the contents of a promissory note for $26,-964.05, signed by said Sacra, Wilson, Cloud and E. C. Sugg & Bro., as makers. Citation was personally served upon all of the defendants in Texas, except J. D. Sugg, who was served in Wyoming Territory with notice of the suit in a manner prescribed by the statutes of Texas.

On the 6th day of November 1885, after the notice was served upon J. D Sugg, but before it was returned into court, the plaintiff, Thornton, recovered judgment by default against J. W. Sacra, J. W. Wilson, Isaac Cloud and the partnership of E. C. Sugg & Bro. and under the statutes of Texas, the judgment can be collected out of the individual property of all of the defendants except J. D. Sugg, and out of the partnership property of E. C. Sugg & Bro.

Before the adjournment of the court for the term, J. D. Sugg, seeking to have said judgment vacated in so far as it attempted to establish a debt against the partnership of E. C. Sugg & Bro., or to affect the property of said firm, moved that the same be set aside because said note was not in fact the partnership debt of E. C. Sugg & Bro., and because being a citizen of Wyoming, and not having been first served with process in Texas, the district court of Cooke county was without jurisdiction or power to render a judgment establishing said note to be a partnership debt, and authorizing the seizure and sale of the property of said firm. The motion was denied by the court and J. D. Sugg and E. C. Sugg & Bro. appealed to the supreme court of Texas, where, on the 8th day of May 1888, the judgment of the lower court was affirmed, and afterwards on the

21st day of December 1888, the supreme court of Texas overruled the motion of the appellants for a rehearing, and said judgement became final.

From this judgment J. D. Sugg, E. C. Sugg and E. C. Sugg & Bro. have prosecuted a writ of error to this court. The other defendants were requested and notified to join in the petition for a writ of error but declined.

The questions involved are these:

1. When one of two partners is served with citation in Texas, and the other, who is a citizen of another state, is not served, has the courts of Texas the jurisdiction or power to render a judgment which establishes the claim as a partnership debt, and under which the property of the partnership may be seized and sold? It was claimed in the district court of Texas, and in the supreme court that the statutes of Texas authorizing such judgment is repugnant to the fourteenth amendment to the constitution of the United States prohibiting any state from depriving any person of property without due process of law, and the validity of said statute was not only affirmed in the courts of Texas, but is necessarily affirmed in the judgment now sought to be revised.

2. The effect of notice of the pendency of the suit, served upon J. D. Sugg in Wyoming, it having been held by the district court and by the supreme court of Texas that said notice estopped him, because he must have known that E. C. Sugg, his partner, would be personally served in Texas and he was presumed to know that the laws of Texas authorized a judgment against the firm upon service upon one partner only.

The questions were raised in the courts of Texas by motion to vacate the judgment, and by assignments of error upon the appeal to the supreme court of Texas, and are discussed in the written opinion of the supreme court of Texas, and are raised in this court by specifications of error based upon the record.

I I.

The specifications or assignments of error are as follows:

"First: J. D. Sugg and E. D. Sugg, being partners under the name of E. C. Sugg & Bro., and J. D. Sugg, being a citizen of Wyoming, and not having been personally served with citation in the state of Texas, and not having entered an appearance, the service of citation upon E. C. Sugg alone in Texas will not, under the fourteenth amendment to the constitution of the United States, support a personal judgment against the partnership under which its property may be seized and sold."

"Second: Article 1224 of the Revised Statutes of Texas, providing that in suits against partners, service upon one partner will authorize a judgment against the firm is repugnant to the fourteenth amendment to the

constitution of the United States, when it is sought, as in this case, to sustain thereunder a personal judgment against a firm, composed of a citizen of Texas, and a citizen of another state, upon a contract not executed in Texas, or to be performed therein, and when the firm is not shown to have property or to have transacted business in Texas, and when only the resident partner has been served with citation."

"Third: Article 1230 of the Revised Statutes of Texas, providing that service upon defendants without the state of Texas may be had by notice served upon them by any person competent to make affidavit and authorizing personal judgments against such non resident defendants, under which this judgement is sought to be sustained, is repugnant to the fourteenth amendment of the constitution of the United States, and does not authorize any judgment affecting the partnership property of J. D. Sugg, not brought within the custody of the court by attachment or otherwise."

"Fourth: The judgment, in so far as it affects the partnership property of E. C. Sugg and Brother or J. D. Sugg's interest therein is a personal judgment upon substituted service affecting the property of a citizen of Wyoming, and is not due process of law, as contemplated by the fourteenth amendment to the constitution of the United States."

"Fifth: The pretense in the opinion of the court that J. D. Sugg, by agreement submitted the question of partnership debt or not to the district court of ooke county, upon ex parte affidavit is not supported by the record, and was a devise and pretense to avoid a direct decision of the validity or invalidity of the tatute of Texas authorizing a judgment against citizens of other states upon substituted service perfected beyond the limits of Texas."

"Sixth: The judgment is not due process of law under the fourteenth amendment to the constitution of the United States because J. D. Sugg, the non resident partner, was not served with citation in Texas, but was denied the opportunity of showing that the claim sued on was not in fact the debt of E. C. Sugg & Bro."

The petition or motion to vacate the judgment was filed December the 5th 1885, was sworn to by J. D. Sugg and that portion of it relating to to the question at issue in this court is as follows:

"That at the time of the institution of this suit, this petitioner, (J. D. Sugg) was a citizen and resident of said territory of Wyoming, and is now and has ever since been such citizen and resident, and that at the time of the institution of said suit the plaintiff, James T. Thornton was a citizen and resldent of the state of Missouri, and has ever since been such citizen and resident, and that the Traders Bank mentioned in the note sued on as its place of payment is and has ever been situated in Kansas

City in said state of Missouri, and that the district court of Cooke county, Texas, is wholly without jurisdiction to render any personal judgment upon said note under which the property of this petitioner owned in his own right and in connection with others can be seized or taken. That the consideration for the note sued on was money lent by the plaintiff to the defendant J, W. Sacra, and that satd note was executed in renewal of a former note for said borrowed money; that said former note was signed by the defendants, J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg as makers, but the said J. W. Sacra was the principal in said note, to whom said money was in fact lent, and the said Wilson, Cloud and Sugg were merely his sureties, all of which was well known to the plaintiff at the time of the execution and delivery of said note; and that after the maturity of said note, the note now sued on was executed in renewal of the same, and that said Sacra is the principal in the note sued on, and the other makers thereof merely his surities, all of which was well known to the plaintiff at the time of the execution and delivery of said note. That neither the note sued on, or any note for which it was given in renewal is or ever was a partnership debt or liability of said E. C. Sugg & Bro., and that this petitioner did not execute the note sued on or authorize anyone else to sign or execute the same for him, or authorize anyone to sign the parthership name of E. C. Sugg & Bro. thereto, and that no one had the right or power to sign the partnership namo of E. C. Sugg & Bro. thereto, or to make the said partnership in any manner liable thereon.

That this petitioner is advised and believes that said E. C. Sugg signed the name of E. C. Sugg & Bro. to said note as the surety of said Sacra without intending to bind said partnership thereon or anyone but himself, but be that as it may, this petitioner in no manner authorized E. C. Sugg or any other person to sign said partnership name to said note and never in any manner ratified or confirmed the execution of said note as aforesaid, and that said note was not executed in the partnership business of E. C. Sugg & Bro., or within the scope of said business. That said E. C. Sugg & Bro. was a partnership engaged in the business of the purchase, sale and raising of cattle and in no other business, and that the execution of notes as security for others was wholly without the scope of said business and neither partner has or ever did have the right or power to use the firm name as security for others, and this petitioner was never consulted in reference to the execution of the note sued on, and did not in fact know that the same was executed until long after the maturity of the same, and said note is not and has never been a debt of the said partnership of E. C. Sugg & Bro., but is the individual debt of said Sacra and was never in any manner assumed by said partnership.

That this petitioner did not have any notice of this suit, and that if even a citizen of Missouri could maintain a personal action in the courts

of Texas against a citizen of Wyoming upon a note payable in Missouri, which is not admitted, but denied, the pretended notice in this case is wholly void and of no effect because the same was issued without authority of law and without any affidavit of the non residence of this petitioner being made or filed in said cause, and the pretended return thereon is wholly insufficient because it is not shown where said pretended service was made upon this petitioner, and that at the time of the rendition of said pretended judgment this defendant was in the said territory of Wyoming, and did not know of the rendition of said pretended judgment until he reached Texas on the 30th day of December, 1885.

That said partnership of E. C. Sugg & Bro. own cattle and other personal property in the state of Texas in which this petitioner and the said E. C. Sugg are jointly interested, but the said partnership is largely in debt, and all of said partnership property is necessary to pay said partnership debts, and that at the time of the institution of this suit the plaintiff well knew that said note was not a partnership debt of said E. C. Sugg & Bro., but at most was merely the individual debt of said E. C. Sugg and that the partnership property of said E. C. Sugg & Bro. was necessary for the payment of its partnership debts, but that the plaintiff, designing and intending to cheat and defraud said partnership and to obtain satisfaction of the individual debt of E. C. Sugg out of the partnership property to the exclusion of partnership creditors did procure the rendition of said pretended judgment by default, and if said judgment is permitted to stand the plaintiff will sacrifice the property of said partnership, and prevent the application of said partnership property to the payment of partnership debts.

The assignment of error on the appeal to the supreme court of Texas were to the action of the court in overruling the motion to vacate the judgment, and in giving validity to the pretended notice served upon J. D. Sugg, appellants claiming that the notice was a nullity.

III.

Article 1224 of the Revised Statutes of Texas in force since March 16th, 1848, provides:

"In suits against partners, the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

Article 1346, in force since February 5th, 1858, provides:

"When the suit is against several partners jointly indebted upon contract, and the citation has been served upon some of such partners but not upon all, judgment may be rendered therein against such partnership and against the partners actually served, but no personal judgment or execution shall be awarded against those not served."

Article 1230 and 1231 provides that when the defendant is not a resident of Texas, he may be cited by notice served upon him without the state, by any person competent to make oath; and article 1234 says that when the defendant has been so served with notice, he shall be required to appear and answer in the same manner and under the same penalties as if he had been personally served with citation in Texas.

The opinion of the supreme court of Texas is brief and by no means clear, but it sufficiently appears that it was controlled by the following views:

1. The service of citation upon E. C. Sugg, brought the partnership before the court and conferred upon it jurisdiction to render judgement against the firm, though J. D. Sugg, one of the partners, was a citizen of another state and had not been cited following;

Alexander vs. Stern; 41 Texas, 193, Railway vs. McCaughey, 62 Texas, 272; Sanger vs. Overmier, 64 Texas, 57; Guimond vs. Nast, 44 Texas, 114.

2. That on the motion of the uncited partner to vacate the judgement, the same should be treated as an ordinary application to set aside a default, and the motion should not only show a defense to the action but an excuse for not making it prior to the default.

3. That, while the notice served upon J. D, Sugg in Wyoming, was under the rule in Pennoyer vs. Neff [but not under any doctrine previously announced in Texas] illegal and void, yet as he must have known that his partner, E. C. Sugg, would be served in Texas, and was presumed to know that such service under the laws of Texas authorized a judgment against the firm, he failed to show an equitable excuse for not making his defense in time, as it was his duty under the circumstances to hasten to the district court of Cooke county, Texas, in advance of the return of the notice and make his defense before default.

4. That, upon the hearing of the motion to vacate the judgment, J. D. Sugg submitted the question of partnership indebtedness or not, to the court upon ex parte affidavits, and is bound by the findings of the court thereon. Whether this conclusion, unsupported as it is by the record, was to reconcile the conscience of the court to an unprecedented harsh enforcement of an atrocious statute or to avoid a direct decision upon the Federal question involved, we know not. If to avoid a decision upon the Federal question, it fails of its purpose.

If the court was without jurisdiction to render the judgment, it follows, as a matter of course, that it was equally without jurisdiction, whether the note was or was not a partnership debt, jurisdiction not being dependent upon the question of debt or no debt, but upon the power of the court over the parties defendant. A void judgment was never made valid by an effort to vacate it. If the court was without jurisdiction to render it was equally without jurisdiction to validate.

The question as to the power of a court to render a judgment against a partnership, when service is had upon but one partner, was first before this court in D'Arcy vs. Ketchum, 11 Howard, 165. Under the statute of New York, similar to that of Texas, a judgment was rendered in New York in favor of Ketchum against the firm of Gossip & Co., composed of Gossip, a resident of New York, and D'Arcy, a resident of Lonisiana, but upon service upon Gossip only. Ketchum then sued D'Arcy upon this judgment in the circuit court of the United States for the western district of Louisiana, relying upon the New York judgment as evidencing a joint liability of Gossip & Co. It was held that the judgment was void, and as against D'Arcy was not evidence of any indebtedness, joint or individual. This case has been followed by several decisions to the same effect.

Public Works vs. Columbia College, 17 Wallace, 521.

Mason vs. Elred, 6 Wallace, 239.

Hall vs. Laning, 91 U. S., 160.

In the note to Wood vs Watkinson, 17 Connecticut, reported in the 44 Am. Decisions, 562, the greater portions of the state decisions upon the subject are discussed.

Mr. Freeman, in his works on judgments, section 574 says: "A judgment against two or more joint debtors on a citation served on but one, though authorized by the laws of the state, is not binding elsewhere upon any of the defendants who were not within the state and who did not appear in the action. Personal judgments thus rendered, have no operation out of the limits of the state where rendered. Their effects are merely local. Out of the state they are nullities, not binding the non resident defendant nor establishing any claim against him."

In some of the states like California, New Jersey and New York, havind joint debtor acts similar to the Texas statutes, the question has arisen whether they are not repugnant to the provision in their state constitution, that no person shall be deprived of property without due process of law. In California such statutes have been held repugnant to the constitution and void.

Pay vs. Hawley, 39 Cal. 95.

In New Jersey a joint debtor act had existed since colonial days, and in Harper vs. Brink, 24 N. J., 333, it was for the first urged that it was not due process of law to adjudge a claim a joint demand against two when only one had been cited. The objection could not be answered, and to give the act any effect, it was held that such judgment only made a prima facie case of joint liability. The uncited partner could always show that he was not liable. The right to a joint judgment depended upon the existence of a joint debt, and if there was in fact no joint debt the judgment was void. The New Jersey doctrine cannot be defended. There is a tradition that once upon a time a custom or law existed under which a person suspected

of crime was executed before trial, but after death his executor was given ample oportunity to vindicate his memory. The New Jersey doctrine is fashioned after this law; it first sells the joint property and after sale, gives to the uncited partner an opportunity to show that the sale was illegal. Does a sale under such judgment pass the title? If not, it is an outrage upon the public who bid at the sale, and if it does it is an outrage upon the uncited alleged joint debtor. In New York, about the same conclusion was reached as in New Jersey. In fact the more recent statute in New York provides that as against the uncited defendant, the judgment sh ll only be prima facie evidence of a joint liability. The courts in construing this statute have in effect held that such a judgement is no evidence at all.

Oakly vs. Aspinwall, 4 N. Y., 525.

Where are we to look to ascertain what is meant by due process of law as the term is used in the federal constitution? Of course we are to look to the general or international law. We are to look to the decisions of enlightened courts, when reviewing judgments rendered in other jurisdictions—to the English decisions giving effect to the judgments rendered in France and other nations—to the state decisions when reviewing the judgments of the sister states, to the federal declsions when reviewing the judgments of the several states, to the Texas decisions when reviewing the judgments of the courts of Arkansas. We are not to look for the rule in the acts of state legislatures and the decrees of state judges when grasping at power beyond their reach, It was such acts that created the necessity for the fourteenth amendment to the federal constitution, which was intended to make a judgment void everywhere else void in Te as, and to render that which was valid in Texas valid in every other state and territory. It was intended to enforce the golden rule, "do unto others as you would have them do unto you." Judge Cooley in his work on constitutional limitations, page 352, says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth college case: 'By the law of the land is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of enactment is not therefore to be considered the law of the land' The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry, and render judgment after trial.' It is entirely correct also, in assuming that a legislative enactment is not necessarily the law of the land. The words by the 'law of the land' as used in the constitution, do not mean a statute passed for the purpose of working

the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: You shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it."

Judgments in all respects like this have time and again been held by this court to be absolutely void. Every court in the Amrrican union or in the civilized world outside of Texas would hold it void except as evidencing the individual liability of E. C. Sugg, the partner cited. The supreme court of Texas would hold that a judgement like this rendered by any court except itself a nullity. This case furnishes a good illustration of the magnificent possibilities of laws like this Texas statute for producing oppression and wrong. Without notice, without citation, without trial the individual debt of one partner has been saddled upon the firm, partnerthip creditors defrauded, and the innocent partner rendered bankrupt. We are told that this is due process of law. If one of the makers or expounders of statutes like this should find himself in the situation of J. D. Sugg, his property taken without an opportunity to be heard, he could not find in all the languages enough emphasis to express his disgust with "due process of law" as explained and enforced by Texas courts, which speaks the word of promise to the ear but breaks it to the hope."

In many of the early cases and in the text books, we meet with expressions that, while personal judgments against citizens of other states upon constructive service are void in all other jurisdictions they are valid in the jurisdiction where rendered. We find the same expression used in respect to judgments under the joint debtor acts of the several states. In Pennoyer vs. Neff, 95 U. S., 732, this court in reference to such expressions says.

"The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the state where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any state of this union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the state where rendered.

Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed

under them. Whilst they are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction and are bound to give the judgments of the state courts only the same faith and credit which the courts of another state are bound to give them.

Since the adoption of the fourteenth amendment to the federal constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no juriseiction do not constitute due process of law."

There is no law in Texas framed in harmony with the intimation thrown out in Penowyer vs. Neff that a non resident entering into partnership in a state, or making contracts enforcable there, may be required to appoint an agent to receive service of process. But if there had been such law there is no allegation that this partnership was formed in Texas, transacted business there, or that the note was payable in Texas. There is nothing to distinguish the judgment in this case from the judgment in Hall vs Lanning; Public Works vs. Columbia college and D'Arcy vs. Ketchum.

Can the judgment be sustained as a proceeding in rem? It has none of the incidents of a judgment in rem. No property has been brought before the court or attempted to be brought. If it has any validity whatever, it is merely as a personal judgment, under which any firm property then owned or thereafter acquired could be seized and sold.

If the supreme court of Texas can maintain a judgment like this where there is no partnership debt in fact, it could, according to the same reasoning, maintain a judgment against an alleged partnership where there was in fact no partnership.

Was the supreme court of Texas justified in presuming as a matter of fact that J. D. Sugg knew that his partner, E. C Sugg would be cited in Texas? And that he was presumed to know that under the laws of Texas such service authorized a judgment against the firm. If E. C. Sugg was a citizen of Texas, he may be presumed to know the laws of Texas, or more correctly speaking, he is not allowed to excuse himself on account of ignorance of such laws. We don't know how this presumed knowledge is to affeet J. D. Sugg unless there is a legal presumption that E. C. Sugg told J. D. Sugg what he knew constructively of Texas law. E. C. Sugg may be held to have constructive knowledge of the laws of Texas, which like constructive notice, is what he does not know, but ought to know. There is no presumption that a man has communicated what he did not but should know. The court could not have meant that J. D. Sugg, a citizen of Wyoming, was presumed to know the laws of Texas, for even the courts of Wyoming do not judicially know the laws of Texas, but they must be proved as facts.

Lawson on Presumptive Ev., p. 5 and 14.

J. D. Sugg may be presumed to know the constitution of the United States, and he might be thus charged with presumptive notice that the courts of Texas had no jurisdiction to render a judgment against him

Prior to October 1868, it had been uniformally held in Texas that the residence of either the plaintiff or the defendant within her boundaries, conferred npon her courts jurisdiction to render a personal judgment. In case the defendant was a non resident, he was cited by publication in a newspaper, and a personal judgment was rendered against him as in ordinary cases. In 1868, in Harrington vs. Williams, 31 Texas, 467, it was held that the court did not have jurisdiction to render a personal judgment against a non resident, but only jurisdiction over his property situated in Texas, to be exercised when the property, by attachment or otherwise, was brought into the custody of the court but not otherwise. Harrington vs. Williams being regarded as revolutionary, was overruled in 1876 in Wilson vs. Zeigler, 44 Texas 657. After the decision of Pennoyer v. Neff, no effort was made to conform the statutes or decisions to the rule therein announced, but later in 1886, in Rice vs. Peteet, 66 Texas, 868, Pennoyer vs. Neff was held to be bad law, and the doctrine reaffirmed that Texas courts had jurisdiction to render personal judgments against citizens of other states. As might have been foreseen, the refusal of the state courts to respect the authority of the federal court in matters strictly federal, has been productive of infinite confusion, loss and hardship. While the property of non residents has been sold under personal judgments rendered in the state courts, citizens of other states have recovered the same property in the courts of the United States, where such judgments are held to be absolutely void. The futility of these efforts to ignore the authority of Pennoyer vs. Neff, at last, in January 1889, in the case of Hockstadler vs Sam, induced the supreme court of Texas reluctantly to regard it as authority. At the time of the decision in Hockstadler vs. Sam, numerous cases were pending in Texas, seeking personal judgments against non residents. In some of these, the non resident defendant, for the purpose of contesting the jurisdiction of the court over him, had appeared and pleaded to the jurisdiction of the court. In April 1889, in York vs. The State, the supreme court of Texas reached one of these cases, and held that any kind of an appearance in a case even for the purpose of pleading to the jurisdiction, conferred upon the court jurisdiction to try the case upon its merits. In Hockstadler vs. Sam, decided a few months before, the non resident defendant had not only appeared and pleaded to the jurisdiction of the court, but answered to the merits, subject to his jurisdictional plea. It was held that these acts did not constitute such appearance as gave the court jurisdiction. In a former case, Fiebleman vs.

Edmonds, 69 Texas, 339, the court had refused to hold that an appearance to plead to the jurisdiction had the effect precisely contrary to that intended, and conferred jurisdiction. Hockstadler vs. Sam, and York vs The State, have not been reported, but will appear in the 11th or 12th Southwestern Reporter. The statute says that the suing out of a writ of error or the taking of an appeal is an appearance for the term next after the reversal of the judgment. When the court decides, a motion to vacate to be an appearance from the beginning, curing all that was previously done, the system is complete—the trap to catch the non resident defendant faces all the points of the compass. It will be seen that the rule in Texas has been in chaos since 1868. The best lawyers have been perplexed by the uncertainty as to what the court would decide next. This illustrates the injustice of presuming that J. D. Sugg, a citizen of Wyoming, knew the laws of Texas. It shows also a hostility on the part of the bench of Texas to the rule of Pennoyer vs. Neff or a deep seated conviction that it is wrong, leading the mind unawares to diligently hunt for grounds, however flimsy or unsupported, upon which judgments against non residents can be affirmed, throwing much light upon the animus of that portion of the opinion which we have now reached.

In Texas, as elsewhere, an application to set aside a default, if made during the term, must show a good defense to the action and an excuse for not making it in time, and must be supported by affidavit. If the application is sustained, the default is set aside, and the case is tried the same as if no default had been taken. To try the merits or demerits of the alleged defense on the hearing of the motion upon ex-parte affidavits, we submit is a practice never heard of before in Texas or elsewhere. Service upon one partner in Texas being regarded as valid service upon the firm, the application of the uncited partner to vacate the judgment, is treated by the Texas courts as an ordinary motion to vacate the default. It would seem, however, that when the uncited partner was a resident of another state, common justice would excuse him from that strict diligence required of a resident of Texas who had been lawfully cited. The opinion is as follows: "The allegations of the motion to set aside the judgment if not denied or contested, were sufficient to entitle appellant to have the judgment vacated, provided that there had been no want of diligence upon his part in failing to interpose the defense set up in his motion prior to the judgment. The material allegations of the motion were denied by the answer of appellee, and, without objection, the court proceeded to try the issue upon affidavits filed by both parties. Appellant having thus submitted to the trial of the issues in that way, he can not now be heard to complain of the result. Had objection been made to any inquiry save upon the question of diligence, it would doubtless have been sustained, and the court would have heard proof on that question. It clearly appears that a

copy of the petition was placed in the possession of the appellant as early as the 16th day of October before the judgment was rendered on the 6th of November, by which he was fully advised of the existence of the note and the character of the suit. He knew that his partner would be served with citation, and is presumed to have known that the law authorized judgment against his firm on such service. It is alleged in the answer to the motion and the allegation is supported by affidavit, that both members of the firm of E. C. Sugg & Bro. conversed with the appellee and his counsel about the judgment and its payment, and nothing was said by either of them in regard to want of authority in E. C. Sugg to sign the firm name to the note until the motion to vacate was filed. The issues raised by the motion to set aside the judgment and the answer thereto, having been tried by the court below upon ex parte affidavits without objection, as the affidavits are conflicting, we think the judgment should not be disturbed."

We maintain that the above opinion is based upon a purely imaginary case, in order to evade the federal question involved.

1. The statement that the parties submitted the trial of the allegations in the motion to the court upon ex parte affidavits, is not only unsupported by the record but a practice previously unheard of. The record shows no agreement to that effect, and contains no recitation indicating such agreement. In Te as, where the note sued on, is alleged to have been executed by the defendant or by a firm of which he is a member, its execution is presumed, unless denied under oath by what is known as a plea of non est factum. The record shows the following bill of exceptions, taken at the time the motion was overruled. "Be it remembered that on this day came on to be heard the motion of the defendant, J. D. Sugg, to vacate the judgment herein and thereupon said J. D. Sugg asked that said motion be granted and said judgment be set aside and that he be permitted to file the answer hereto attached, marked xxxx.," which motion the court overruled and refused to set aside said judgment and permit said answer to be filed, to all of which the defendant excepts and tenders this, his bill of exception, and asks that the same be signed and certified and made a part of the record hereof which is accordingly done This December 23d, 1885.

F. E. PINER,
District Judge."

The answer referred to was a duly verified plea of non est factum, denying that this note sued on was the act of the firm of E. C. Sugg & Bro. or executed by its authority.

The judgment overruling the motion was rendered Dec. 23d, 1885, and is as follows:

Now, on this day came in to be heard the motion and application of J. D. Sugg, filed in this court on the 5th day of December, A. D., 1885 to set aside and vacate that certain judgment rendered in the above entitled

and numbered causes on the 6th day of November, A. D., 1885: also came on to be heard the replication of plaintiff to said motion at the same time, and the court after hearing the said motion and plaintiff's replication tehereto and the argument of counsel and being fully advised in the premises there being no other evidence in favor of said motion or in favor of the replication thereto except the affidavits attached to said motion and the affidavits attached to plaintiff's replication. It is the opinion of the court that the law is for the plaintiff; it is therefore considered by the court that said motion to vacate said judgment be and the same is hereby overruled to which ruling of the court the said J. D. Sugg and E. C. Sugg & Bro. excepted and in open court gave notice of an appeal to the supreme court of the state of Texas."

If the court will examine the answer of James T. Thornton to the motion referred to in the opinion, it will be seen that neither the answer nor any material part of it was supported by affidavit, as stated in the opinion. The answer ought to be preserved as a curiosity in pleading. It contains the remarkable statement that, if its allegations are not admitted, the pleader stands ready to prove them. Instinctively feeling that there would be a disposition to grab at straws, in order to affirm the judgment and to negative any possible presumption that any proof of these allegations was introduced, at our request, the judgment was made to recite that no evidence was introduced. Like the plea of the non resident to the jurisdiction, it seems to have had the effect opposite to that intended, and the supreme court seized upon the judgment as evidence of an agreement to try the case before the court upon ex parte affidavits. Does the record support the opinion? A non resident went into court, asking that a default be set aside and that he be alowed to make a defense; but in some mysterious way, unknown to him or to the court or to his counsel and unheard of in former practice, he was granted a trial upon ex parte affidavits and the door shut in his face. "There are stranger things in heaven and no earth, Horatio, than are dreampt of in your philosophy."

The statement in the opinion that the material allegations in the motion were denied by the answer of the appellee and supported by affidavit, is not verified by the record. The motion was sworn to by J. D. Sugg, and supported by the affidavits of J. W. Sacra, Isaac Cloud, J. W. Wilson and E. C. Sugg, as follows:

"I, J. W. Sacra, one of the defendants in the above cause, on oath, say that I am the principal in the note sued on, and the other makers are merely my sureties, that the consideration for said note was money lent by plaintiff to me and used by me in my own business, and that the plaintiff knew at the time of the execution of said note that I was the principal therein, and that the other makers were my sureties, that said note is not a partnership debt of E. C. Sugg & Bro., and if J. D. Sugg, the other partner, ever authorized such signature I never knew or was informed of it."

"We, Isaac Cloud and J. W. Wilson, two of the defendants in the above cause, on oath, say that as stated in the annexed motion, the consideration of the note sued on, was money lent by the plaintiff to the defendant, J. W. Sacra, and that said Sacra is the principal in said note and the other makers thereof are merely his sureties and that said note is not and never was a debt or liability of the partnership of E. C. Sugg & Bro. and the said partnership name was signed to said note as surety for J. W. Sacra."

"I, E. C. Sugg, one of the defendants in this cause, on oath, say that the note sued on was given in renewal of a former note signed J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg, payable to the plaintiff and for money lent by plaintiff to said J. W. Sacra, and the said Sacra was the principal in said note and the other makers, including myself, merely his sureties and that the note sued on was given in renewal of said former note and for no other or different consideration; and at the time the note sued on was signed E. C. Sugg & Bro., it was presented to me by J. W. Sacra, and as I was preparing to sign it, said Sacra remarked to me, "sign it E. C. Sugg & Bro.," and I did so, without thinking much of the matter, and without reflecting that the partnership name could not be used in that way, but without any intention of injuring or defrauding anyone. Said note is not a partnership debt of E. C. Sugg & Bro and never was, and said partnership name was signed to said note as security for said Sacra outside of the scope of said partnership business without the knowledge or consent of J. D. Sugg, the other partner."

The note, while payable to James T. Thornton, was the property of the Traders Bank, of Kansas City, Mo., of which said Thornton was president, and M. W. Sinclair, cashier.

The only affidavits attached to the answer of J. T. Thornton that can be claimed in any way to contradict the affidavits supporting the motion are the affidavits of said Sinclair and Thornton, as follows:

M. W. Sinclair, being duly sworn, says that he is cashier of the Traders Bank of Kansas City, Mo., that he has carefully examined the books of said bank and that it does not appear therefrom that said bank ever had in its possession a note signed by J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg, neither does it appear that said bank ever had in its possession a note signed by E. C. Sugg together with said Sacra, Wilson and Cloud except the one in judgment herein, wherein said Suggs' name appears as follows: 'E. C. Sugg & Bro,'"

"James T. Thornton, being duly sworn, says that he is the plaintiff in the above cause and is also president of the Traders Bank of Kansas City, Mo., that the note on which this judgment was obtained was not given in renewal of a note signed by J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg, but was given by the defendants herein, just as it appears from the face of said note, that neither this affiant nor the Traders Bank

authorize the seizure and sale of his interest in the partnership property, it is certainly not due process of law; for if so, it would be due process of law to give a promissory note the force and effect of an execution, under which the sheriff could seize and sell any of the supposed debtor's property. It may be contended that any other rule than that established in Texas would be very inconvenient. It is often inconvenient for a creditor to find property of his debtor out of which his demand may be satisfied; but to obviate this, it would not do to allow one man's property to be taken for another man's debts. Nothing could be more inconvenient to the uncited partner or more unjust than to have the private debts of his co-partner wrongfully adjudged to be firm debts without opportunity to defend, and the business of the partnership ruined and partnership creditors defrauded–such however would be the results of this Texas statute, construed and enforced as the supreme court of Texas has attempted by the judgment which this court is asked to review.

A pretended joint judgment against two, when citation has been served upon but one, does not merge the original cause of action. D'Arcy vs. Ketchum, 11 Howard. That which has not progressed beyond, or gone higher or sunk deeper than the starting point, the original cause of action, cannot with any propriety be called a judgment. The note, unless its execution be denied, is evidence of an indebtedness, while the pretended judgment, though certified under the seal of the court, is not evidence of anything except that it was rendered. A judgment is the authoritative decree of a court having jurisdiction of the subject matter and of the parties, estopping them and their privies, and closing the door against all inquiry into that which existed prior to its rendition. Under such judgment, the property of the parties may be seized and sold, for that is due process of law. Anything that falls short of this, is not due process of law. Of course, to seize and sell property to satisfy a promissory note, would not be in accordance with the law of the land, and a pretended judgment that has not progressed beyond the note, and works no estoppel, cannot be of greater dignity than the note itself. If this anamalous decree possessed any of the attributes of a judgment, it would not only establish the claim as a debt against the partnership of E. C. Sugg & Bro., but the liability of each partner; for the debt of the firm, as a matter of course, is the debt of each member of the firm. To attempt to adjudge a claim the debt of a firm but not the debt of each member, would be absurd. No court except the court rendering the same, has ever allowed a decree like this any of the attributes of a judgment, being but another illustration of the proverbial blindness of the parent to the imperfections of its offspring.

All of which is respectfully submitted.

SAWNIE ROBERTSON,
W. O. DAVIS,
Attorneys for plaintiffs in error.

Office Supreme Court U. S.
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No. _____

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

J. D. SUGG ET ALS., Plaintiffs in Error,

VERSUS

JAMES T. THORNTON. Defendant in Error.

ERROR FROM THE SUPREME COURT OF TEXAS.

REPLY FOR PLAINTIFFS IN ERROR TO MOTION TO DISMISS OF DEFENDANT IN ERROR.

SAWNIE ROBERTSON,
W. O. DAVIS,
Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

J. D. SUGG ET ALS., Plaintiffs in Error,

VERSUS

JAMES T. THORNTON, Defendant in Error.

The plaintiffs in error have on file the number of printed briefs required by the rules. In these the questions raised by the Motion to Dismiss are discussed, and in them all parts of the record bearing upon the questions involved, are copied. The Court is respectfully asked to consider said briefs as a part of the opposition of the defendant's in error Motion to Dismiss.

It seems to be seriously contended that the validity of Articles 1224 and 1346 of the Revised Statutes of Texas, authorizing judgment against a partnership on service upon one partner, was not drawn in question in the State Court. It seems to us that the validity of these articles is necessarily drawn in question and affirmed by the judgment itself. The motion of the uncited partner to vacate the judgment, because, being a citizen of another state and not having been personally cited in Texas, the Court was without jurisdiction to render any personal judgment under which his property, owned in his own right and in connection with others, could be seized, necessarily drew in question the validity of Articles 1224 and 1346 under which the judgment was rendered. The motion was overruled. The denial of the motion necessarily affirmed the validity of Articles 1224 and 1346; for it is not pretended that the judgment was authorized by

anything except said articles. It seems to be supposed upon the part of the other side that, for a Federal question to be raised, there should be something in the pleading to the effect that the statutes were repugnant to the Fourteenth Amendment to the Constitution of the United States. Pleadings are for the statement of facts, and not for the expression of a party's opinion of the law of the land. It would not only be improper but demurrable for pleadings to be encumbered with long recitations of the law, verified by affidavit, for the edification of the Court, which judicially knows the law. The question is fully discussed in Murray vs. Charleston, 96 U. S., where a Federal question was raised without the Constitution of the United States, or the laws passed pursuant thereto, being mentioned.

The Supreme Court of Texas expressly affirmed the validity of Articles 1224 and 1346. They say: "The allegations of the motion to set aside the judgment, if not denied nor contested, were sufficient to entitle appellant to have the judgment vacated, provided there had been no want of diligence upon his part in failing to interpose his defenses." It is apparent from this that the Supreme Court of Texas sustained the validity of the statutes and the judgment rendered pursuant thereto and held that J. D. Sugg, the uncited partner, had the same rights and no more, than a defendant, who had been personally cited and failed to make answer, would have had under the circumstances. It is further stated in the opinion that the extra-territorial service upon J. D. Sugg, notified him of the pendency of the action, that he knew that his partner would be served in Texas and that he was presumed to know that, under the law, such service authorized a judgment against the firm. What law did the Supreme Court of Texas have in its mind? As a matter of course, Articles 1224 and 1346 of the Revised Statutes, and the Court thereby clearly affirmed their validity, as had been previously done in various decisions. It was even held that the extra-territorial notice deprived J. D. Sugg of any equitable or moral claim upon the Court to have the judgment vacated.

It is further claimed that, on the motion to vacate, J. D. Sugg, the uncited partner, was granted a trial upon ex parte affidavits. Does judicial history furnish a precedent for any such trial? We say that this is a pretext for evading the Federal question involved. We have discussed the matter fully in our Brief. In Texas, as elsewhere, when a motion is made during the term to vacate a default, it must show a meritorious defense and an excuse for not making it prior to the default. If the motion is sustained, the default is set aside and the case tried as if no default had been taken. Dowell vs. Winters, 18 Tex., 796. Such a thing as trying the truth or falsity of the alledged meritorious defense upon the hearing of the motion, is unknown. If relief is sought against a default judgment after the adjournment of the term of Court at which it was rendered, it must be

by an original proceeding and tried as any other suit, and, if successful, the judgment will not be vacated but enjoined. Overton vs. Blum, 50 Tex., 423; Roller vs. Woolridge, 46 Tex., 485; Taylor vs. Fore, 42 Tex., 256.

Rule 47, made by the Supreme Court of Texas for the government of the District Courts, says: "No agreement between parties or attorneys touching any suit pending, will be enforced unless it be in writing, signed and filed with the papers as a part of the record." There is no agreement in the record to submit the question of partnership debt or not, to the Court upon ex parte affidavits. There is no recitation in the judgment that any such agreement was made; there is no finding in the judgment of any question of fact, and the law, not the facts, is found against the motion. There is a vague recitation in the judgment that there was no evidence in favor of the motion or the replication thereto except the affidavits attached to said motion and replication. It is this recital that is sought to be tortured into an agreement between the parties to submit the question of partnership debt or not, to the Court upon ex parte affidavits. The supposed agreement would be this: If the debt was found to be a partnership debt, the motion should be overruled; but, if not a partnership debt, the judgment, as a matter of course, to be perpetually enjoined. This would be a remarkable agreement, such as sane men would not be presumed to make and such as the Court should not find, if the record admits of any other construction. Non-residents seeking relief against illegal judgments ought not to be deprived of their rights upon any such shallow pretexts. J. D. Sugg had a right to attack the judgment, because the Court was without jurisdiction. He also, without waiving this right, had the further right to show that the note sued on was not a partnership debt, and that, even under the laws of Texas as construed by Texas Courts, the judgment should be set aside. The finding of the lower Court and the decision of the Supreme Court of Texas, cannot be supported upon any such ground. We have shown in our Brief that the affidavits abundantly showed that the note was not a partnership debt and that the affidavits not only were not contradicted but were fortified by the affidavit of the defendant in error himself, who did not deny that the consideration for the note was money lent to J. W. Sacra and that the partnership name of E. C. Sugg & Bro. was signed to said note as security for said Sacra by E. C. Sugg. If there had been such an agreement as claimed, the Court, having regard for the evidence, would have been constrained to find that the note was not a partnership debt and would have enjoined the judgment. The Supreme Court of Texas reviews judgments upon questions of fact as well as of law. Railway vs. Schmidt, 61 Tex., 282; Railway vs. Bracken, 59 Tex., 71. When the trial is by deposition or written evi-

dence, so that no presumption can arise that the trial Court was influenced by the manner or appearance of the witnesses upon the stand, the Supreme Court of Texas attaches little, if any, weight to the finding of the trial Court, holding that, in such cases, they are in as good position to judge as the Court below. Thorn vs. Frazier, 60 Tex., 266. If the Supreme Court of Texas had seriously thought there had been an agreement to submit the question of partnership debt or not, to the Court upon ex parte affidavits, it would certainly have reversed the lower Court, and perpetually enjoined the judgment. No one having any regard for human testimony, can read the record and have any doubt that the firm name was used as security for another without the consent of the uncited partner.

It is insinuated in the Motion to Dismiss that the assignments of error to the Supreme Court of Texas were not sufficiently definite. The Supreme Court of Texas did not question the sufficiency of the assignments of error. The opinion is not based upon any supposed defect or insufficiency in the assignments. While not so specific as they might have been, they were sufficient to raise the questions involved. In Texas, errors going to the foundation of the action or to the right of the Court to render the judgment, will be considered, though not assigned. Hardesty vs. Fleming, 57 Tex., 395; Dyer vs. Dement, 37 Tex., 431; Pendleton vs. Colville, 49 Tex., 467.

If our theory is correct, the error was fundamental, going to the right of the Court to render any judgment against J. D. Sugg or the partnership of E. C. Sugg & Bro., and would have been considered by the Supreme Court of Texas, even though not assigned.

All of which is respectfully submitted.

SAWNIE ROBERTSON,
W. O. DAVIS,
Attorneys for Plaintiffs in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1141.

J. D. SUGG ET AL *vs.* JAMES T. THORNTON.

ERROR FROM THE SUPREME COURT OF TEXAS.

W. O. DAVIS,
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JUDD & DETWEILER, PRINTERS.

Sup. Brief on motion to dismiss.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1141.

J. D. SUGG ET AL. *vs.* JAMES T. THORNTON.

ERROR FROM THE SUPREME COURT OF TEXAS.

It is claimed that the question of the repugnancy of articles 1224 and 1346 of the Revised Statutes of Texas to the Federal Constitution was not raised in the courts of Texas.

It is an elementary rule that pleadings should state facts and not law, or even facts judicially known. In the petition to vacate the judgment the court was asked to set it aside so far as it affected J. D. Sugg or his property, individual or partnership, because the court was without jurisdiction, the note sued on being payable in Missouri, the plaintiff a citizen of Missouri, and the petitioner a citizen of Wyoming. How much further could the petitioner have gone without violating the elementary rule that pleadings must state facts and not law? Upon what principle can it be claimed that the petitioner did not raise for discussion and decision all law, State or national, constitutional or statutory, which authorized or forbade the rendition of a judgment upon the facts

stated? The petition or motion was certainly sufficient to bring up for decision the question in the district court; and, if so, it follows as a matter of course the assignment that the court erred in denying the motion brought up the same questions for decision in the supreme court of Texas. Under the assignment, it was not only the right but the duty of the supreme court to pass upon the law which it was claimed supported the judgment. It is true that the supreme court, in its opinion, studiously avoided all mention of the Constitution of the United States or articles 1224 and 1346 of the Revised Statutes of Texas; but how could they affirm the judgment without sustaining articles 1224 and 1346 and holding them not to be repugnant to the Federal Constitution? We should look to this scope and effect of the judgment and not to what is said in the opinion. The Federal question was involved in the case, was called up for decision, and was in fact decided. If the injured party can be deprived of a decision here by the failure of the State court to mention the question in the opinion, the right conferred is not worth contending for. Often in the States' supreme courts, and especially in Texas, judgments are affirmed upon oral opinion. Is a party thereby deprived of his right of review in this Court? The constitution of Texas, like that of most States, has, since 1836, contained the provision that no one should be deprived of property without due process of law. Notwithstanding this provision, the supreme court of Texas for more than fifty years, with but one exception, sustained personal judgments against non-residents upon substituted service. It has in more than a dozen cases sustained a judgment against a partnership when but one member of the

firm had been cited. It is not to be supposed that the Texas supreme court would place a construction upon a provision in the Federal Constitution different from that which it had uniformly placed upon the same provision in the State constitution. The question was considered too well settled for debate or discussion. It was ignored and the uncited partner was given the same rights as any other defendant who had suffered default after lawful notice, and no more.

It is claimed that the assignments of error to the supreme court of Texas were too vague. The same point was made in the supreme court of Texas and held untenable. Questions affecting the jurisdiction of the court are fundamental, and are not only raised without any assignment, but may be urged collaterally whenever the judgment is sought to be used as evidence of any right. There were two distinct assignments questioning the jurisdiction of the court to render any judgment affecting the property of J. D. Sugg, whether individual or partnership. The objection that the assignments were too vague is frivolous. It was not necessary to say anything about due process of law, for to take without the power and without the opportunity to defend is to take without due process of law. It will be seen that the supreme court, in the opinion, admitted that as to J. D. Sugg it was without jurisdiction; yet this court, having no jurisdiction, rendered a judgment taking J. D. Sugg's interest in the partnership property, all he possessed, and applying it to the individual debt of his copartner. If this is not an exercise of jurisdiction, under what name should it be known? If a court without jurisdiction can strip a man of all his property, with a little jurisdiction what is there beyond its power?

It is claimed, however, that the Federal question was waived because the petition to vacate the judgment raised not only a Federal question, but one not Federal, and the first did not override the last, but the last overruled the first. The question rests upon this shallow foundation: J. D. Sugg said to the court, "You had no jurisdiction over me, and could not lawfully render any personal judgment against me under which my property, though but a partnership interest, can be seized and sold, and therefore I ask that your judgment, in so far as it affects me or my interest in the partnership property, be set aside; and, in addition to this, I say that the note sued on is not the debt of my partnership, but the individual debt of my partner, and if you will set your judgment aside and allow me to appear I will submit to your jurisdiction and interpose my defense. The point is now made that the motion was bad because it was supported by merit as well as by law; that merit and law cannot go hand in hand, but the one overrides the other; so that no man can receive both law and equity. What was there improper in the offer of J. D. Sugg to interpose his defense, provided the judgment should be set aside so that he could do so? It was his legal right to have the judgment set aside, and, when set aside, it was his legal right to appear in the case, and his willingness so to do in no manner deprive him of any of his rights. The rule in Kansas relied upon to sustain the motion never did exist in Texas. In Texas a party may plead or assign and rely upon as many points or defenses as he deems proper. He can plead to the merits and to the jurisdiction at one and the same time. He may file as many inconsistent defenses as his fancy or his interest may

suggest. One defense is never held to overrule or neutralize another. A person is not compelled to elect upon which of several defenses he will rely, but may rely upon them all. The Texas rule may be seen in the following cases:

Fowler *vs.* Davenport, 21 Tex., 633.
Smith *vs.* Sublett, 28 Tex., 163.
Lemmons *vs.* Handly, 28 Tex., 219.
Hurt *vs.* Blackburn, 20 Tex., 601.
Hillebrant *vs.* Booth, 7 Tex., 499.
Duncan *vs.* Majette, 25 Tex., 255.

In the practice and decisions of Texas no support can be found for the doctrine contended for in the motion. To suppose that the Texas courts were controlled by any such doctrine is to deal in purest fiction.

All of which is respectfully submitted,

W. O. DAVIS,
Attorney for Plaintiffs in Error.